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PUBLIC UTILITIES COMMISSION  
STATE OF CALIFORNIA  
505 VAN NESS AVENUE  
SAN FRANCISCO, CALIFORNIA 94102

LORETTA LYNCH  
COMMISSIONER

TEL: (415) 703-2444  
FAX: (415) 703-3933

November 12, 2004

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
Twa325  
445 Twelfth Street, SW  
Washington, DC 20554

**Subject: CC Docket No. 01-338 and WC Docket No. 04-313**

Dear Ms. Dortch:

On October 4, 2004, the California Public Utilities Commission (CPUC) submitted the "Staff Report on Investigation Concerning Competitive Local Carriers' Deployment of Facilities" (CPUC Staff Report) to the Federal Communications Commission (FCC). The CPUC Staff Report responded to the FCC's invitation in its August 22, 2004 Interim Order [footnote full cite] to submit summaries of the state proceedings conducted pursuant to the FCC's August 2003 Triennial Review Order (TRO).

On October 18, 2004, one of the CPUC's five commissioners, Susan Kennedy sent an ex parte letter to the FCC in response to the CPUC Staff Report. Her eight-page letter offered her opinion that the CPUC Staff Report was of limited usefulness to the FCC in determining the extent of competitors' deployment of local circuit switching in the mass market.

We write to point out that Commissioner Kennedy's letter only represents the view of a single commissioner on the CPUC.<sup>1</sup> As we will explain, the undersigned commissioners are of the opinion that the CPUC Staff Report offers a valuable summary of perhaps the most detailed and comprehensive TRO record developed by any state. We further believe that the CPUC Staff's conclusions can provide highly useful guidance for the FCC as it refines its impairment analysis for unbundled switches.

<sup>1</sup> Commissioner Kennedy correctly notes that parties did not have an opportunity to comment on the CPUC Staff Report. However, Commissioner Kennedy, in her capacity as the commissioner assigned to manage the TRO docket, is the person who prevented the release to the parties of the staff's findings and thereby foreclosed any opportunity for comments prior to submission of the report to the FCC.

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### **Contributions of the CPUC Staff Report**

We believe the CPUC Staff Report provides an excellent summary of California's TRO record that should be of great assistance to the FCC. Because of its many attractive markets and large population, California has been a focus of competitor efforts to compete with the incumbent local exchange carriers (ILECs). Consequently, the California record offers data regarding a state in which competition is likely to be more highly developed than most other states. That said, competition, particularly UNE-L competition, is still extremely limited in California. As the CPUC Staff Report points out, in SBC's service territory (which comprises the vast majority of California's access lines), all the UNE-L competitors claimed by SBC have a *combined* mass market share of, at best, slightly more than 1%.<sup>2</sup> This fact alone highlights the extremely limited self-provisioning of switches by UNE-L competitors.

In its analysis of market definition, the CPUC Staff Report also strikingly highlights the clustered nature of competition in California. In all of the metropolitan statistical areas (MSAs) offered by the ILECs as markets in which the self-provisioning triggers are met, the Staff Report shows that there are large, geographically cohesive areas of the MSA in which there are no competitive local exchange carriers (CLECs) serving mass market customers using their own switches.<sup>3</sup> This is an important fact that the FCC should consider as it addresses market definition in its revised rules.

Commissioner Kennedy finds it unfortunate that the CPUC staff did not limit itself to a dry recitation of the facts in the record and instead offered its conclusions on what the data show. We respectfully disagree with our colleague and find it a virtue that the CPUC staff took the extra step of attempting to apply the FCC's rules to the data. In so doing, the CPUC Staff Report highlights some of the key judgment calls that need to be made in an impairment analysis. In any complex analysis where the stakes are so high, there will always be some discretionary judgment when applying the rules to the facts. Were it not so, the FCC could just delegate the impairment decisions to low pay grade clerks who could receive the data, count up the number of competitors in each market, and simply stamp "Impaired" or "Not Impaired" on the paperwork. No matter how detailed the FCC's rules, impairment decisions will always require an exercise of judgment.

The conclusions that Commissioner Kennedy finds unfortunate are actually a strength of the CPUC Staff Report in terms of assisting the FCC in revising its rules. Whether or not one agrees with all of the CPUC staff's conclusions – and we believe our staff has made a strong case for its conclusions – the CPUC Staff Report should assist the FCC in recognizing areas in which the TRO rules would benefit from clarification.

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<sup>2</sup> CPUC Staff Report at 77.

<sup>3</sup> CPUC Staff Report at 23-26 and Appendices 1 and 2.

For instance, a significant issue in the CPUC proceeding was whether there should be some *de minimus* number of lines or market presence before a CLEC should be counted in the mass market trigger analysis. Commissioner Kennedy finds it obvious that there should be no *de minimus* requirement whatsoever, but even SBC excluded CLECs with fewer than 5 otherwise qualifying lines. SBC did this in order to ensure that CLEC test lines or administrative lines were not counted.<sup>4</sup> SBC's five-line exclusion is not explicit in the TRO rules, but is certainly a bare minimum requirement to satisfy the spirit of the self-provisioning trigger rule. The question posed by the CPUC Staff Report and that the FCC should address is whether there should be a higher *de minimus* standard that should be met before a competitor is counted in the analysis. The CPUC Staff has made a case for 1% threshold that is worthy of the FCC's consideration.<sup>5</sup>

Another significant judgment call is whether CLECs who do not serve residential customers at all should be considered in the self-provisioning trigger analysis. The CPUC staff makes a strong case that such carriers should not be counted.<sup>6</sup> As the Staff Report points out, residential customers constitute the majority of mass market customers. In addition, citing the TRO, the CPUC staff noted some of the key differences between residential and small business customers, including the fact that small business customers often provide greater revenues through additional lines, vertical features, data services and yellow pages listings. Accordingly, it is often much easier to make a business case for serving business customers than residential customers. If carriers are not serving any residential customers at all, it makes little sense to count them as serving the mass market.

### **Continuing Need for Switch Unbundling**

Commissioner Kennedy professes to be troubled by the degree of judgment the CPUC staff found it necessary to exercise in applying the TRO rules to the California data. Much of her letter appears to urge the FCC to clarify its rules to make them less subject to key judgment calls. We agree with Commissioner Kennedy that clarification would be useful, and as we have pointed out above, believe the CPUC Staff Report highlights issues that would benefit from clarification. Yet, at the end of her letter, she calls for the FCC's revised rules to include a potential deployment analysis "in all levels of an impairment test." (Kennedy letter at 8). As Commissioner Kennedy herself recognized, examining potential deployment is a "more extensive, qualitative, and subjective analysis." (Kennedy letter at 3). It is difficult to discern whether Commissioner Kennedy endorses more or less discretion and subjectivity in the impairment analysis.

With respect to switch unbundling, Commissioner Kennedy's letter shows that she has already reached her conclusion as to the right outcome and that broad policy

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<sup>4</sup> CPUC Staff Report at 77.

<sup>5</sup> CPUC Staff Report at 76-79.

<sup>6</sup> CPUC Staff Report at 73-76.

considerations, not the data, dictate her view. She flatly states that the FCC's new rules should just "eliminate switching as an unbundled network element." (Kennedy letter at 6). Central to her conclusion is her view that CLECs using unbundled switching are doing so at the expense of ILECs "who are leasing their networks at below cost rates." (*Id.*) On the CPUC, this is a minority view that is contrary to the CPUC's adopted position -- recently reaffirmed in a decision updating UNE prices for SBC -- that SBC's unbundled network element (UNE) rates are cost-based and in accord with the FCC's TELRIC standard.<sup>7</sup>

Commissioner Kennedy's desire for the FCC to put an end to unbundled switching without regard to the data on switching alternatives is directly at odds with the Telecommunications Act of 1996. Under Section 251(d)(2) of the Act, for each potential UNE, the FCC is required to determine whether the lack of access to that UNE "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." With regard to the local circuit switch, the FCC cannot ignore data such as has been amassed by the CPUC showing at best extremely limited mass market UNE-L competition in some of the most attractive markets in the country. Contrary to our colleague, we believe that the FCC is legally required to conduct a thorough analysis of the evidence, with the assistance of the states as the FCC finds necessary,<sup>8</sup> before reaching any decisions about impairment for mass market switching.

We also cannot concur with our colleague that voice over Internet protocol (VOIP) services signal the end for the need to unbundle either switches or loops. VOIP services require a broadband connection, which -- based on current broadband penetration rates -- prevents \_\_ percent of households from having even the option to use a VOIP service. On that of that serious limitation, most VOIP services suffer from inferior or nonexistent E911 access and do not offer back-up power in the event of a power failure. For these reasons, VOIP services cannot be considered either comparable in quality or substitutes for mass market circuit-switched voice services.

We further disagree with Commissioner Kennedy's recommendation that, whatever new unbundling is permitted, it should automatically sunset in three years. We support reexamination of unbundling rules every three years, but a flash-cut termination of UNE access as the default outcome will defeat the universally shared goal of producing more facilities-based competition. Particularly with respect to the loop, three years is far too short a period to expect competitors to transition off of ILEC loops. Competitors will not move to UNE-L if they face the prospect that loops will automatically cease to be a UNE

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<sup>7</sup> CPUC Decision 04-09-063 (Commissioners Brown, Lynch and Wood in the majority and Commissioners Kennedy and Peevey in the minority).

<sup>8</sup> Although the *USTA II* decision holds that the FCC may not delegate authority to make impairment decisions to state commissions, *USTA II* does not rule out a Section 271-like process in which states' can develop factual records and make recommendations to the FCC.

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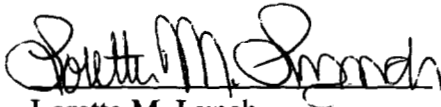
well before the competitors have any capability to make the massive investment necessary to deploy their own loops.

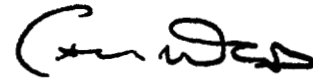
### **Conclusions**

The CPUC Staff Report offers a valuable and comprehensive summary of the CPUC's TRO record. The judgment calls that the CPUC staff found it necessary to make provide useful, real-world guidance regarding the issues that would benefit from clarification in the revised rules. With respect to mass market switching, the new rules should recognize the significant differences between serving residential and small business customers and not deem CLECs that use their own switches to serve only business customers as true mass market competitors. The CPUC Staff Report represents a comprehensive and lucid summary and analysis of the CPUC's extensive record. We believe it will be of enormous value to the FCC's revision of the unbundling rules, particularly in light of the limited time for the FCC to complete this important task.

We appreciate the opportunity to present our views and to explain how our perspectives differ from those of our colleague.

Sincerely,

  
Loretta M. Lynch

  
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Carl Wood